81-2351

No.

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In the Supreme Court of the United States

October Term, 1982

DAVID W. SCHREFFLER,
Petitioner

v.

PENNSYLVANIA LABOR RELATIONS BOARD; EASTERN LANCASTER COUNTY SCHOOL DISTRICT; and EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Whether a state may, consistent with the first and fourteenth amendments to the United States Constitution, provide, by means of a comprehensive legislative scheme governing public employe labor relations, that 1) a labor organization certified as such by the state administrative agency having jurisdiction over such matters shall be the exclusive representative for purposes of negotiating with a given public employer with respect to terms and conditions of employment of all employes within a given bargaining unit of the work force of the public employer, whether or not such employes are members of the labor organization, and 2) the labor organization thus certified may exclude members of the unit which it exclusively represents who are not members of the labor organization from voting on the ratification of collective bargaining agreements which it negotiates, on behalf of all members of the unit, with the public employer?

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ADMINISTRATIVE AND JUDICIAL OPINIONS DELIVERED BELOW

The opinion of the Commonwealth Court of Pennsylvania in this matter, reproduced in Appendix A, is reported at 58 Pa. Commonwealth Ct. 78, 427 A.2d 305 (1981). The opinion of the Court of Common Pleas of Lancaster County, Pennsylvania, in the matter, reproduced in Appendix B, is unreported. The Pennsylvania Labor Relations Board, the administrative agency having original jurisdiction in the matter, issued a nisi decision and order and a final order, both of which are reproduced in Appendix C. The nisi decision and order is reported at 9 Pa. Public Employe Rptr. ¶9192 (1978), while the final order is reported at 10 Pa. Public Employe Rptr. ¶10131 (1979).

JURISDICTION

The order of the Commonwealth Court of Pennsylvania sought to be reviewed was entered on March 25, 1981. Within thirty days after the entry of the order, Petitioner David W. Schreffler filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, seeking further review in the state courts. The Supreme Court of Pennsylvania denied Mr. Schreffler's petition for allowance of appeal by order dated March 26, 1982, and Mr. Schreffler's attorney was notified of this order by the Prothonotary of the Supreme Court of Pennsylvania on March 31, 1982. A copy of this notification is reproduced in Appendix D. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the constitutionality of several provisions of the Pennsylvania Public Employe Relations Act, 43 Pa. Stat. Ann. §§1101.101 *et seq.* (Purdon Supp. 1981), as interpreted by the Pennsylvania courts. The relevant provisions of the Act, 43 Pa. Stat. Ann. §§1101.401, 1101.606, 1101.902 and 1101.1201 (Purdon Supp. 1981), are reproduced in Appendix E.

The constitutional provisions involved are Amendments I and XIV to the United States Constitution, both of which are also reproduced in Appendix E.

STATEMENT OF THE CASE

Petitioner David W. Schreffler is, and at all material times has been, a public school teacher employed by Respondent Eastern Lancaster County School District ("School District"). Mr. Schreffler has enjoyed "tenured" status, under the applicable state law, as a "professional employe" of the School District since June, 1970.

Pursuant to the Pennsylvania Public Employe Relations Act, 43 Pa. Stat. Ann. §1101.101 *et seq.* (Purdon Supp. 1981), in September, 1971, Respondent Eastern Lancaster County Education Association ("Education Association") was certified by Respondent Pennsylvania Labor Relations Board ("Board") (an administrative agency of the government of the Commonwealth of Pennsylvania having primary jurisdiction over administration of the Public Employe Relations Act) as the exclusive representative, for collective bargaining purposes, of a bargaining unit of the School District's employes including Mr. Schreffler. Since that time, the Education Association has negotiated collective bargaining agreements with the School District which govern the terms and conditions of the employment by the School District of all members of the bargaining unit, including Mr. Schreffler. Mr. Schreffler has never joined the Education Association, but rather has chosen to exercise his right, recognized in 43 Pa. Stat. Ann. §1101.401 (Purdon Supp. 1981), to refrain from union membership. Even though Mr. Schreffler does not desire to be a member

of the Education Association, state law—specifically 43 Pa. Stat. Ann. §1101.606 (Purdon Supp. 1981)—mandates that only the Education Association, since it has been properly certified by the Board, may negotiate with the School District regarding the terms and conditions of Mr. Schreffler's employment; he may not do so himself.

Although the Education Association exclusively represents all members of the bargaining unit in negotiating collective bargaining agreements with the School District, and is required by state law to represent all unit members—whether or not they are Education Association members—fairly in doing so, it only permits unit members who are also Education Association members to vote on ratification of the agreements which it negotiates with the School District. Mr. Schreffler, then, because he is a unit member who has chosen not to join the Education Association, is precluded from voicing his views on the contract which governs the terms and conditions of his employment by the School District.

The present controversy has arisen out of negotiations between the School District and Education Association regarding a collective bargaining agreement effective from July 1, 1976 through June 30, 1978. Specifically, in September, 1977, the School District and Education Association agreed upon an amendment to this agreement providing for a group dental plan. Pursuant to the amendment, each employe in the unit would have one-half of the cost of the prorated premiums for the dental plan deducted from his or her salary, while the other half would be paid by the School District.

The Education Association scheduled a meeting for September 6, 1977, to conduct a vote on ratification of this amendment. Mr. Schreffler was informed by representatives of the Education Association that he would not be allowed to participate in this meeting or vote on ratification of the amendment because he was not a member of the Education Association. A notice of the meeting disseminated by the Education Association limited the meeting to Education Association members and any of the School District's teachers who intended to join the Education Association. The meeting was thus conducted and resulted in ratification of the amendment to the collective bargaining agreement.

In view of the fact that he had been denied a voice in ratifying the amendment to the collective bargaining agreement, Mr. Schreffler subsequently informed the School District and the Education Association that he wanted no deductions made from his salary for dental insurance. Nonetheless, the School District instituted such deductions in October of 1977 and continued thereafter to make them.

The institution of these deductions prompted Mr. Schreffler to file charges of unfair labor practices with the Board alleging that the conduct of both the Education Association and the School District constituted violations of 43 Pa. Stat. Ann. §1101.1201 (Purdon Supp. 1981). Following established Board procedure, a hearing was conducted on Mr. Schreffler's charges before a Board Hearing Examiner, after which the parties submitted briefs to the Board. In the brief submitted to the Board on Mr. Schreffler's behalf, the federal question here presented was first raised. (Con-

solidated Brief of Complainant in Cases No. PERA-C-10, 685-C and PERA-C-10, 686-C before the Board, at 13-16). The Board addressed this issue in its nisi decision and order (reproduced in Appendix C). The issue was further urged on Mr. Schreffler's behalf in exceptions to the Board's nisi decision and order (at ¶¶9 and 10), wherein it was stated, in pertinent part, that:

> 9. Complainants except to the conclusion of the Board that Section 902 [of the Public Employe Relations Act] allows employe organizations to deny non-members the right to vote on collective bargaining agreements for the reason that this conclusion is contrary to law in that the non-members are thereby denied their rights guaranteed in Article IV of the [Public Employe Relations] Act and the Constitution of the United States ...
>
> 10. Complainants except to the conclusion of the Board that a ratification vote on a collective bargaining agreement, or an amendment thereto, is an integral part of the Education Association's representation process from which non-members may lawfully be excluded for the reason that such conclusion is contrary to law and denies the Complainants their rights guaranteed by the [Public Employe Relations] Act and the Constitution of the United States ...

(R.214a).

The constitutional argument was reiterated on Mr. Schreffler's behalf in the brief submitted in support of said exceptions (at 16-20). The Board issued a

final order, dismissing the exceptions and denying the relief sought by Mr. Schreffler, in which the constitutional issue was again addressed. (See Appendix C.)

A petition was then filed on Mr. Schreffler's behalf with the Court of Common Pleas of Lancaster County, Pennsylvania, seeking review of the Board's final order, in which it was alleged that:

> 14. The Pennsylvania Labor Relations Board erred in its Final Order by failing to find that the exclusion of non-members from participation and voting on the collective bargaining agreement while at the same time they are denied the right to negotiate directly with the Eastern Lancaster County School District violated the rights of non-members guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(R.40a)

The issue was again argued on Mr. Schreffler's behalf in a brief presented to the Court of Common Pleas (R. 75a-79a). That court issued an order affirming the Board's final order, and in its opinion in support thereof addressed the federal question raised herein. (See Appendix B.)

Mr. Schreffler appealed the order of the Court of Common Pleas to the Commonwealth Court of Pennsylvania, where, again the constitutional issue was raised and argued on his behalf (Dkt. Nos. 516 and 517 C.D. 1980 in the Commonwealth Court of Pennsylvania, Consolidated Brief for Appellant David W. Schreffler at 26-32). The Commonwealth Court af-

firmed the Court of Common Pleas and addressed the constitutional issue in its opinion. (See Appendix A.)

Mr. Schreffler then sought further state-court review by filing a petition for allowance of appeal with the Supreme Court of Pennsylvania, once again raising the federal question herein presented (Dkt. No. 199 E.D. Misc. Dkt. 1981 in the Supreme Court of Pennsylvania, Petition for Allowance of Appeal, at 3, 8). The Supreme Court of Pennsylvania, by order dated March 26, 1982, declined to hear the case.

The federal question advanced herein has thus been raised and preserved at every stage of the proceedings below.

REASONS FOR ALLOWANCE OF THE WRIT

1. The court below decided the federal question raised herein in a manner not in accord with prior decisions of this Court. Mr. Schreffler claimed below that since the Pennsylvania Public Employe Relations Act provided that only the Education Association (having been duly certified by the Board) could negotiate on his behalf with his employer, the School District, *see* 43 Pa. Stat. Ann. §1101.606 (Purdon Supp. 1981), the Education Association's state-law duty to represent all members of the bargaining unit fairly must compel it to permit non-union members of the unit, such as Mr. Schreffler, to vote on contract ratification. Otherwise, Mr. Schreffler claimed, the statutory scheme providing for such exclusive representation would subject him to a denial of his right to petition the government (his employer), protected by the first amendment to the United States Constitution, as a result of his exercising his right, protected by both 43 Pa. Stat. Ann. §1101.401 (Purdon Supp. 1981) and the first amendment, not to associate with the Education Association.

This Court has recognized the fundamental nature of an individual's constitutionally protected interest in petitioning the government, as well as the applicability of this right to all levels of government. *See, e.g., City of Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976); *California Motor Transportation Company v. Trucking Unlimited*, 404 U.S. 508 (1972). The Court has similarly

recognized the status of associational freedom as a "basic constitutional freedom," *see Buckley v. Valeo*, 424 U.S. 1, 25 (1976), which includes the right of a public employe *not* to associate without an adverse effect on his employment. *Elrod v. Burns*, 427 U.S. 347 (1976). The Court has further acknowledged that the concept of exclusive representation in labor relations, by its very nature, brings such constitutional issues into play. *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944).

Where, as here, it is claimed that such first-amendment-protected interests are "significantly impair[ed]," it is clear that the state action which effects the claimed impairment "must survive exacting scrutiny." *Elrod*, at 326. As the Court stated in *Elrod*,

> 'This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not as an unintended but inevitable result of the government's conduct ...' Thus encroachment 'cannot be justified by a mere showing of some legitimate governmental interest ... The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.'

Id. (citations omitted).

Examination of the Commonwealth Court's opinion below reveals that the court did not subject the state action in question—the penalizing of Mr. Schreffler's exercise of his right not to associate by totally depriving him of his right to petition—to the exacting

scrutiny required by *Elrod*, but rather barely scrutinized it at all. In a one-paragraph discussion, the court dismissed Mr. Schreffler's constitutional contentions with a cursory citation of this Court's decision in *Abood*, a case in which the Court expressly declined to rule upon the union's duty to non-union members of the bargaining unit either with respect to the specifics of collective bargaining or otherwise. *See* 431 U.S. at 236 n. 33. The court did not require the Board, as the organ of the Commonwealth government which implemented the challenged state action, to demonstrate a "paramount" state interest justifying the restriction of Mr. Schreffler's constitutional rights, nor was any attention given in the court's opinion to whether or not the state's legitimate interest in the orderly conduct of public-sector labor relations could have been fulfilled in a manner less restrictive of the rights of Mr. Schreffler.

The court below thus erred in not following this Court's consistent direction as to the standard to be employed in reviewing state action which restricts, or results in a burden being attached to, the exercise of freedoms protected by the first amendment, as applied to the states through the Due Process Clause of the fourteenth amendment. It is respectfully submitted that if the court below had employed the correct standard it would have either struck down the relevant provisions of the Pennsylvania Public Employe Relations Act on constitutional grounds or endeavored to interpret those provisions in a manner significantly less restrictive of Mr. Schreffler's constitutionally protected freedoms. In order to correct this error, the Court should grant this petition and hear this case on its merits.

2. This case presents the Court with an opportunity to answer significant questions, left unresolved by prior decisions, regarding the constitutional rights, in the context of collective bargaining, of a substantial portion of the nation's public-sector work force. As pointed out above, the Court, in its *Abood* and *Steele* decisions, has acknowledged that constitutional issues are inherent in the concept of exclusive representation in the labor relations field. The Court has not previously been presented with the question of constitutional restrictions placed on a state-certified exclusive representative with respect to its dealings with non-union members of the bargaining unit which it represents.

In *Abood*, the Court held that a public employe's complaint that a state statute authorizing an "agency shop" provision in a public employer-public employe labor organization collective bargaining agreement resulted in a violation of his rights protected by the first and fourteenth amendments to the Federal Constitution stated a cause of action. The Court went on to uphold the constitutionality of the challenged provision on the grounds that the limited infringement imposed by the requirement that the bargaining unit members pay an agency fee to the exclusive representative was justified by the overriding importance of distributing the costs of collective bargaining among its beneficiaries, pointing to specific findings to that effect by the Michigan legislature. The Court expressly reserved decision on the question of the exclusive representative's duties to non-union bargaining unit members with respect to collective bargaining. 431 U.S. at 236 n. 33.

The question thus reserved in *Abood* is squarely presented in the instant case and is ripe for a decision by this Court. It cannot be gainsaid that public-employe collective bargaining (and, concomitantly, state statutes allowing and governing it) has become increasingly prevalent in recent years. The concept of exclusive representation which inevitably accompanies collective bargaining precludes the public employe from communicating directly with—petitioning, as it were—his or her employer regarding the terms and conditions of his or her employment. To the extent that the public employe wishes to exercise his or her constitutionally protected freedom not to associate with the exclusive representative and the exclusive representative is permitted under state law to confine voting on the ratification of collective bargaining agreements which it negotiates with the employer to union members, the public employe is deprived of an opportunity to even indirectly communicate with his or her government regarding the terms and conditions of his or her employment.

In view of the Court's acknowledgment in *Elrod* that public employes are protected in their right not to associate without adverse impact upon their employment, the widespread introduction of collective bargaining into the public sector has given rise to an unresolved tension between the first and fourteenth amendment rights of public employes, on the one hand, and the concept of exclusive representation, on the other, especially where, as here, the governing statute provides that public employes shall have a right not to engage in union activities. *See* 43 Pa. Stat. Ann. §1101.401 (Purdon Supp. 1981). At least one

state appellate court has resolved this conflict by deciding, as a matter of state statutory construction, that non-union members of exclusively represented public employe bargaining units have a right to vote on contract ratification. *See International Brotherhood of Painters v. Anderson*, 401 So.2d 824 (5th Dist. Ct. App. Fla. 1981). The Court should grant this petition and resolve this conflict, as a matter of federal constitutional law, by deciding the instant case on the merits.

Respectfully submitted,
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APPENDIX A

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

NO. 516 C. D. 1980

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

DAVID W. SCHREFFLER,

Appellant

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY SCHOOL DISTRICT

NO. 517 C. D. 1980

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

DAVID W. SCHREFFLER,

Appellant

Before:

Honorable James C. Crumlish, President Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge
Honorable David W. Craig, Judge
Honorable John A. MacPhail, Judge
Honorable Madaline Palladino, Judge

Argued: February 3, 1981—Harrisburg

OPINION

Opinion by Judge Rogers, Filed: March 25, 1981.

David Schreffler[1] appeals from an Order of the Court of Common Pleas of Lancaster County affirming the Pennsylvania Labor Relations Board's (PLRB) dismissal of his unfair labor practice charges brought against the Eastern Lancaster County School District (school district) and the Eastern Lancaster County Education Association (union).

The facts as found by the PLRB and supported by substantial evidence of record are as follows:

The union is the certified exclusive representative of the school district's professional employees. Appellant is a high school social studies teacher in the

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[1] Since we decide that appellant's numerous contentions are without merit, it is unnecessary to determine whether the cause was properly brought as a class action.

district and, therefore, a member of the bargaining unit, but has never been a member of the union. In September, 1976, the union and the school board executed a two year collective bargaining agreement. One year later the contracting parties negotiated an amendment to the agreement which, *inter alia*, provided for the extension of group dental insurance coverage to all professional employees at a cost to be borne equally by the individual employees and the school district.

On September 6, 1977, the union held a meeting for the purpose of explaining and discussing the amendment and voting on the question of its ratification. Appellant received notification of the meeting in the form of a flier in his school mailbox but did not attend. Both union members and non-members were present at the meeting. All those in attendance were invited to ask questions and express their views concerning the proposed amendment. As required by Article XII of the union constitution and longstanding practice a vote was taken on the question of ratification by a show of hands of the union members present. Non-members were asked to sit apart from members, presumably to facilitate counting the votes. The proposed amendment was ratified by the approximately one hundred union members present with one member dissenting.

Thereafter appellant notified the school district that he did not wish to be included in the group dental plan and did not authorize the requisite payroll deduction of $1.75 (since reduced to $1.31) for that purpose. Nevertheless this amount was deducted from his pay and appellant filed charges with PLRB alleg-

ing unfair practices of the union and the school district under Section 1201 of the Public Employee Relations Act (PERA)[2] and a violation by the union of its duty to fairly represent "in good faith and without discrimination" all school district professional employees whether or not they are union members. *Robinson v. Abington Education Association*, 32 Pa. Commonwealth Ct. 563, 571, 379 A.2d 1371, 1374 (1977).

Specifically, appellant challenges the union's practice of polling only union members on the question of contract ratification arguing that this practice deprives him of the representation during collective bargaining that he is entitled to by statute and, in violation of the state and federal constitutions, infringes upon his freedoms of speech and association and his right to petition the government. Appellant also attacks the particular group dental insurance amendment ratified

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[2] Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. §1101.1201, which provides in pertinent part:

(a) Public employers, their agents or representatives are prohibited from:

(1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act.

(2) Dominating or interfering with the formation, existence or administration of an employe organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization.

....

(b) Employe organizations, their agents, or representatives or public employes are prohibited from:

(1) Restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act.

at the September 6th meeting and the union's membership requirement that annual dues be paid not only to the local organization but to the statewide and national affiliates as well.[3]

It is undisputed that a union owes a duty of fair representation to all members of the bargaining unit it is certified to serve. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & N.R.Co.*, 323 U.S. 192 (1944); *McCluskey v. Department of Transportation*, 37 Pa. Commonwealth Ct. 598, 391 A.2d 45 (1978). This duty is owed equally to union and non-union employees: *see International Association of Machinists v. NLRB*, 626 F.2d 119 (9th Cir. 1980); *Brown v. College of Medicine and Dentistry*, 167 N.J. Superior Ct. 532, 401 A.2d 288 (1979), and includes the responsibility on the part of union representatives to communicate with and solicit the views of those, whether or not they are union members, directily affected by collective action. *See Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332 (5th Cir. 1980); *Williams v. Pacific Maritime Association*, 617 F.2d 1321 (9th Cir. 1980); *Retana v. Apartment, Motel, Hotel & Elevator Operators Union Local 14*, 453 F.2d 1018 (9th Cir.

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[3] In a separate unfair labor practice charge appellant argued that the union's request for attorney's fees and costs "discourag[ed him] from exercising [his] rights under PERA." PLRB denied the union's request and refused to issue a complaint based on appellant's charge. PLRB's action in refusing to issue a complaint was not "a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." *Pennsylvania Social Services Union Local 668 v. PLRB*, 481 Pa. 81, 89, 392 A.2d 256, 259-260 (1978). "Judicial discretion [will not] be substituted for administrative discretion." *Id.*

1972). Breach of this duty is an unfair labor practice. *Robinson v. Abington Education Association, supra.*

Equally well established is the right of unions and other voluntary associations to govern their internal affairs without judicial interference and the rule that the procedure applicable to the ratification of collective agreements is an internal union matter. The union membership can, by adopting appropriate constitutional provisions or by-laws, either give to or withhold from the membership the right to ratify collective agreements by popular vote. *See Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1967).

In *Pastrana v. Folding Box, Corrugated Box and Display Workers Local 381*, 212 F.Supp. 639 (S.D.N.Y. 1962)[4] union members, invoking the union's duty of fair representation, sought to prevent the effectuation of a collective bargaining agreement which had been executed by the employer and union officials in the face of a majority vote of the bargaining unit employees to reject the contract. The District Court held that the union, as the employees' democratically selected representative, had the right, absent an internal rule to the contrary, to enter into a collective agreement despite popular rejection.

In *Lear-Siegler, Inc. v. International Union, United Automobile, Aerospace, and Agricultural Im-*

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[4] Decisions of the federal courts interpreting the National Labor Relations Act, though not controlling, provide some guidance in the interpretation of PERA. *See Pennsylvania Labor Relations Board v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975).

plement Workers, 287 F.Supp. 692 (W.D. Mich. 1968), the employer challenged the union's practice of polling skilled and non-skilled members separately on the question of contract ratification. The Court held that contract ratification procedures are an internal union matter not subject to judicial review—reasoning that sufficient democratic input was provided by the earlier certification and representation elections in which the union was selected by all the employees as their bargaining representative and by which certain union members were selected to attend the international union's constitutional convention where the questioned ratification procedure was adopted. The Court wrote:

> "Union members are bound by the constitution and by-laws of the union, and by the lawful decisions of their representatives, just as citizens of a state are bound by the laws of the legislature. Obviously the 'one-man, one-vote' rule does not give citizens the right to a democratic vote on each action taken by their elected officials. Similarly, that rule will not be extended to every action taken by labor unions."

Id. at 697. In *Oregon City Federation of Teachers v. Public Employee Relations Board*, 23 Or. App. 540, 543 P.2d 297 (1975) an uncertified teacher's union challenged the bargaining representative union's contract ratification procedure. It was held that: "the means of contract ratification [is left] to the discretion of the exclusive representative. Although it might be rare, it would be legal for the union's leadership to ratify a contract without any form of consultation with the general membership." *Id.* 543 P.2d at 299.

In support of his position that the duty of fair representation requires that non-members of the union be polled on the question of contract ratification, appellant relies on *Branch 6000, National Association of Letter Carriers v. NLRB*, 595 F.2d 808 (D.C.Cir. 1979). In that case non-union employees successfully challenged the results of a union referendum conducted to determine whether days off would be scheduled on a fixed or rotating basis. Recognizing that the usual fair representation case requires a showing of disparate impact of the contract terms on the complainant group, a showing absent in the record before it, the Court nevertheless affirmed the NLRB's conclusion that the union had not functioned, as it was required to do, in a representative capacity. The decision was premised on the presence of "unique circumstances"—specifically, that the referendum was restricted to union members and that each union member was instructed to vote only his personal preference. The Court distinguished the situation before it from more typical contract ratification procedures as follows:

> "This does not mean that exercise by the union membership of the decisionmaking responsibility would violate the duty of fair representation under all circumstances. Thus, we do not have before us a case of a procedure, with appropriate safeguards, which contemplated that the union membership would act as a 'committee of the whole,' and that the vote of each member would reflect some consideration of the interests of all employees.
>
> ....

> "We are in no position to reject as untenable the Board's statement that the Branch 6000 procedure is distinguishable from a procedure of contract ratification restricted to union members. A union ratification procedure is consistent with negotiation of a tentative contract by the bargaining agent, acting in a representative capacity, and with observance of the duty of fair representation. ... [T]he bargaining representative is not required to carry out the wishes of non-union employees; it suffices that he is available to ascertain them and take them into account."

Id. 812-813.

In the instant case there is no allegation that the amendment at issue affects non-union employees differently from union members. Appellant indeed testified that he desired not to participate in the dental plan only because, as he testified, he "has good teeth". Further this case is quite different on the facts from *Branch 6000, supra*. Here both union and non-union employees were notified of the ratification meeting. Here both union and non-union employees were present at the meeting and were invited to ask questions and express their views.[5] There is no indication that

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[5] Appellant testified that two named union officials had previously told him that he would not be permitted to "participate" at the meeting. This testimony was directly disputed by one of the officials who was called as a witness for the union. Testimony by appellant's wife, also a non-union professional employee in the school district, established that non-union members had attended contract ratification meetings in the past though they had not been permitted to vote. Additional testimony of appellant, relied on by the court below, indicates

union members were instructed to vote only their own preferences or to disregard the interests of their non-union fellows. We will not presume that the interests of non-union employees were disregarded. On the contrary, "[t]he general presumption is that the union's representative obligation has been performed in good faith". *Branch 6000, supra*, at 812. The appellant failed to establish a violation of the duty of fair representation.

This result is supported by the one decision (not before cited in this proceeding) which deals with the precise issues here presented. *See Daigle v. Jefferson Parish School Bd.*, 345 So.2d 583 (La.App.Ct. 1977) writ refused 347 S.2d 260 (1977) which upheld the legality of a contract ratification procedure restricted to union members. Additional support is provided by Section 902 of PERA, 43 P.S. §1101.902 which provides:

"RATIFICATION BY UNION MEMBERS

> If the provisions of the constitution or bylaws of an employee organization requires ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions."

It is clear from this provision that the legislature is aware of the practice of restricting contract ratification to union members. Nevertheless this practice is

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that he understood the conversations at issue to mean that if he attended the meeting he would not be permitted to vote on the question of ratification.

not among those enumerated as unfair labor practices in Section 1201 of PERA, 43 P.S. §1101.1201.

We can now quickly dispose of appellant's remaining contentions. Since the union has not committed an unfair labor practice, the related charge against the school district is similarly groundless.

Appellant's constitutional arguments seek to call collective bargaining itself into question. For example, he argues that his inability under the doctrine of exclusive representation to negotiate as an individual with the school district deprives him of his constitutional right to petition the government. The complete answer to such arguments lies in the determination of the Supreme Court that the limited infringement on individual rights implicit in the NLRA and similar state statutes is justified by the compelling state interest in the orderly resolution of labor disputes. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Cf. *PLRB v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975).

Finally, the matter of the union's affiliation with the statewide and national organizations and the commensurate increase in annual dues is, like the matter of ratification procedure, an internal union affair. *See Blanchard v. Johnson*, 532 F.2d 1074 (6th Cir. 1976), *cert. denied sub nom Maritime Engineers Beneficial Association v. Johnson*, 429 U.S. 834 (1976). *Accord* NLRB General Counsel Administrative Ruling No. SR-726 (1960), 46 LRRM 1492.

ORDER

AND NOW, this 25th day of March, 1981, the order of the Court of Common Pleas of Lancaster County is affirmed.

(s)Theodore O. Rogers
Theodore O. Rogers, J.

This decision was reached prior to the expiration of the term of office of Judge Wilkinson.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 516 C. D. 1980

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

DAVID W. SCHREFFLER,

Appellant

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY SCHOOL DISTRICT

NO. 517 C. D. 1980

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

DAVID W. SCHREFFLER,

Appellant

ORDER

AND NOW, this 25th day of March, 1981, the order of the Court of Common Pleas of Lancaster County is affirmed.

(s)Theodore O. Rogers
Theodore O. Rogers, J.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

Trust Book No. 45
Page 190

Appeal from Order of Pennsylvania Labor Relations Board

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY SCHOOL DISTRICT

and

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

Trust Book No. 45
Page 208

Appeal from Order of Pennsylvania Labor Relations Board

PENNSYLVANIA LABOR RELATIONS BOARD

v.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

Before

Bucher, J., Mueller, J., Eckman, J. and Hummer, J.

OPINION

By Bucher, J.

This is an appeal from order of the Pennsylvania Labor Relations Board (Board) dated May 1, 1979, which dismissed two charges of unfair labor practices filed against the Eastern Lancaster County School District (District) and the Eastern Lancaster County Education Association (Association) by David W. Schreffler (Schreffler). Schreffler has also appealed a ruling of the Board on May 17, 1979, whereby Board refused to issue a complaint based on Association's request for counsel fees and costs.

HISTORY OF CASE

District is a political subdivision of the Commonwealth of Pennsylvania with its principal place of business at New Holland, Pennsylvania. Association is an employee organization which exists for the purpose,

in whole or in part, of dealing with employers concerning grievances, employee-employer disputes, wages, rates of pay, hours of employment or conditions of work. Association is the duly certified employee representative for the School District's professional employees including its teachers. Schreffler has been employed as a teacher by District for the past nine and a half years. On September 20, 1976, Association and District entered into a collective bargaining agreement covering the period from July 1, 1976, through June 30, 1978. On September 8, 1977, the parties entered into an amendment to said agreement providing for increased compensation, extended sick leave and a group dental plan for all members in the bargaining unit. The cost of the dental insurance was agreed to be shared as follows: "The School District shall pay 50% of the member's costs and each member shall pay 50% of the cost." Association held a meeting on September 6, 1977, for the purpose of explaining the amendment and taking a vote on its ratification. The Association's constitution and by-laws permit only members of the Association to vote. Schreffler is not a member of the Association and did not attend the ratification meeting. Over Schreffler's objections District deducted $1.75 from his October 7, 1977, paycheck for his share of the dental insurance premium. District has been deducting $1.31 from Schreffler's paycheck for this purpose since January 7, 1978. Within the past seven years Schreffler's wife, a non-member of Association and an employee of District, has attended contract ratification meetings held by Association. Association permitted non-association members to attend the September 6, 1977, ratification meeting and permitted them to ask ques-

tions about the contract. On November 14, 1977, Schreffler inquired about joining Association and was told by Association that a condition was that he join the Pennsylvania State Education Association and National Education Association, the total membership dues being $131.00.

The gravamen of Schreffler's complaint against District and Association is that he was not permitted to participate in the ratification meeting of September 6, 1977.

The Board's findings of fact are supported by substantial and legally credible evidence.*

A complete answer to Schreffler's argument that he was not allowed to participate in the September 6, 1977, meeting is found at page 60 of the record where he equates participation with the right to vote:

> "Q. ... Therefore, Mr Schreffler, what does the word 'participate' mean as you testified to it?
>
> A. If I can't vote, and I am not, and I am not allowed to, you know, what is the point in expressing an opinion if I can not vote or what I say is not going to be taken under advisement? So ...
>
> Q. I am not asking you, sir, what is the point—

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* Section 1501 of the Public Employe Relations Act of July 23, 1970, P.L. 563, No. 195 (43 PSA 1101.1501) which makes such findings conclusive has been repealed by the Act of April 28, 1978, P.L. 202, No. 53 Sec. 2(a)(1442) effective June 27, 1978; however the standard of review set forth therein continues to be applied by the appellate courts. See, e.g., Appeal of Cumberland Valley School District et al., 483 Pa. 134. In any event the standard of review has not been challenged.

THE EXAMINER: Let him finish the answer, please.

THE WITNESS: So, you know, participation is being able to vote for ratification of the contract."

The Board correctly ruled that an employee organization can and should restrict contract ratification to members of the bargaining unit who are also members of the employee organization. While Section 902* of the Act does not explicitly say this it nevertheless implies as much.

Appellant's contention that the denial of his voting rights violates the First and Fourteenth Amendments of the United States Constitution is based largely on language taken from Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944): "While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them

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* "If the provisions of the constitution or by-laws of an employee organization require ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions." 43 P.S.1101.902.

notice of and opportunity for hearing upon its proposed actions."

We have no quarrel with Steele and, in fact, conclude that the District and Association complied with its letter and spirit. And see Abood v. Detroit Board of Education, 431 U.S. 209, wherein the United States Supreme Court upheld the constitutionality of an agency shop agreement under which all employees, regardless of union membership, were required to pay union dues or its equivalent to retain their employment.

Appellant's further contention that Association committed unfair labor practices (a) in requiring prospective members to join and support its affiliates and (b) in attempting to impose attorney fees and costs are without merit. The first is an internal matter, and the latter contention is frivolous.

AND NOW, February 20, 1980, the order of the Pennsylvania Labor Relations Board dated May 1, 1979, at PERA-C-10, 685-C and PERA-C-10, 686-C and its administrative dismissal dated May 17, 1979, are affirmed.

BY THE COURT:
(s) Wilson Bucher
Wilson Bucher,
Judge

APPENDIX C

OPINIONS AND ORDERS OF PENNSYLVANIA LABOR RELATIONS BOARD

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

Case No. PERA-C-10,685-C

PENNSYLVANIA LABOR RELATIONS BOARD

vs.

EASTERN LANCASTER COUNTY SCHOOL DISTRICT

Case No. PERA-C-10,686-C

PENNSYLVANIA LABOR RELATIONS BOARD

vs.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

NISI DECISION AND ORDER

A Charge of Unfair Practices was filed with the Pennsylvania Labor Relations Board (Board) on December 13, 1977, by David Schreffler (Complainant) and "all others similarly situated" alleging that the Eastern Lancaster County School District (School District) engaged in unfair practices contrary to the provisions of Sections 803 and 1201 (a), (1), (2) and (3) of the Public Employe Relations Act (Act) by deducting dental insurance premium payments from employe paychecks pursuant to an agreement with the Eastern Lancaster County Education Association (Education Association) at a time when not all of said employes were allowed to vote on the ratification of the agreement solely because they were not members of the Education Association. This Charge was docketed to Case No. PERA-C-10,685-C.

The Board issued a Complaint and Notice of Hearing on January 3, 1978, fixing January 26, 1978, in Lancaster as the time and place of hearing. The School District filed an Answer on January 6, 1978, in which it generally denied the Charge.

A second Charge of Unfair Practices was filed with the Board by the Complainant on December 13, 1977, alleging that the Education Association violated Sections 803 and 1201 (b) (1) of the Act by denying bargaining unit members who were not members of the Education Association the right to vote on the ratification of the collective bargaining agreement with the School District; by accepting unlawful assistance from the School District; and by causing the School District to discriminate against its employes by encouraging membership in the Education Association. This Charge was docketed to Case No. PERA-C-10,686-C.

The Board issued a Complaint and Notice of Hearing on January 3, 1978, fixing January 26, 1978, in Lancaster as the time and place of hearing. The Education Association filed an Answer on January 23, 1978, generally denying the Charge. The Education Association also filed a Motion to Dismiss the Charge on January 23, 1978, to which Motion the Complainant filed a response on February 10, 1978.

The aforesaid hearings were rescheduled and held before a duly designated Hearing Examiner of the Board on February 28, 1978, at which time all parties of interest were afforded a full opportunity to present testimony, examine and cross-examine witnesses and introduce documentary evidence.

The Board, on the basis of the testimony presented and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That the Eastern Lancaster County School District is a political subdivision of the Commonwealth of Pennsylvania with its principal place of business at 309 Diller Avenue, New Holland, Pennsylvania 17557.

2. That the Eastern Lancaster County Education Association is an employe organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, employe-employer disputes, wages, rates of pay, hours of employment or conditions of work with its principal offices c/o Elaine M. Austin, President, Blue Ball Elementary School, Blue Ball, Pennsylvania 17506.

3. That the Education Association is the duly certified employe representative for the School District's professional employes including, *inter alia*, its teachers. (Stipulation, N.T. 4, Joint Exhibit No. 1)

4. That the Complainant, David W. Schreffler, has been employed as a teacher by the School District for the past 9½ years. His residence is located at R. D. 1, Box 259-A, Robesonia, Pennsylvania. (N.T. 14)

5. That on September 20, 1976, the Education Association and the School District signed a collective bargaining agreement covering the period from July 1, 1976 through June 30, 1978. (Exhibit C-4)

6. That on September 8, 1977, the parties signed an amendment to their agreement, which amendment provides for increased compensation, extended sick leave and a group dental plan for all members in the bargaining unit. The cost of the dental insurance was agreed to be shared as follows: "The School District shall pay 50% of the member's cost and each member shall pay 50% of the cost". (Exhibit C-4A)

7. That the Education Association held a meeting on September 6, 1977, for the purpose of explaining the amendment and taking a vote on its ratification. (N.T. 79-80)

8. That Article XII of the Education Association's Constituiton and By-Laws provides as follows:

> "Article XII: *Ratification Procedures*
>
> Those members of the local association, who are also members of a bargaining unit shall be given the opportunity at a general or special

meeting to vote on the ratification of any agreement negotiated with the Board of School Directors under Act 195. Such agreement shall not become binding until properly ratified by a majority of those association members attending the ratification meeting". (Exhibit C-2)

9. That only members of the Education Association who were also members of the bargaining unit were permitted to vote at the September 6, 1977, ratification meeting. About 100 members voted. Of these 100, all but one voted for ratification of the amendment. (N.T. 80-82)

10. That the Complainant is not a member of the Education Association. (N.T. 22)

11. That the Complainant did not attend the ratification meeting of September 6, 1977. (N.T. 28)

12. That over the Complainant's objection the School District deducted $1.75 from his October 7, 1977, paycheck for payment of his share of the dental insurance premium. The School District has been deducting $1.31 from each of Schreffler's paychecks for this purpose since January of 1978. (N.T. 26-27, Exhibit C-7)

13. That within the past seven years the Complainant's wife, a non-member of the Education Association who is also employed by the School District, has attended contract ratification meetings held by the Education Association. (N.T. 67-69)

14. That at the September 6, 1977, contract ratification meeting the Education Association permitted non-Education Association members to attend and ask questions regarding the contract. (N.T. 79)

15. That on November 14, 1977, the Complainant inquired about joining the Education Association. He was told by the Education Association that, in order to join the Education Association, he must also join the Pennsylvania State Education Association (PSEA) and the National Education Association (NEA) with which the Education Association is affiliated. The total membership dues for these organizations is $131.00, of which $85.00 is for membership in PSEA and $16.00 is for membership in NEA. (N.T. 23, 33, 81)

DISCUSSION

The Complainant charges that the Education Association violated the Act by breaching its duty of fair representation, by unlawfully accepting assistance from the School District and by causing the School District to violate the Act; and that the School District violated the Act by encouraging membership in the Education Association. These charges were filed after the Education Association prohibited members of the bargaining unit who are not also members of the Education Association from voting on the ratification of an amendment to the collective bargaining agreement between the School District and the Education Association. Since the charges are inextricably bound together on the facts, we will consider them at the same time.

We first dispose of a procedural point. The Complainant filed his charge on his own behalf and on

behalf of "all others similarly situated." The record does not show who these "others" are. They did not file individual charges, did not request to be a party at the hearing or even appear at the hearing.

Section 1302 of the Act provides in pertinent part as follows:

> "Whenever it is charged by any interested party that any person has engaged in or is engaging in any such unfair practice, the board, or any member or designated agent thereof, shall have authority to issue and cause to be served upon such person a complaint, stating the charges in that respect, and containing a notice of hearing before the board, or any member of designated agent thereof, at a place therein fixed, not less than five days after the serving of said complaint."

Section 95.31(a) of our Rules and Regulations provide as follows:

> "All charges shall be in writing on forms supplied by the Board and shall be signed and sworn to before any person authorized to administer oaths. An original and three copies of the charge shall be filed with the Board by one or more public employes, or any employe organization, acting in their behalf, or by a public employer."

The charges herein were properly filed to the extent they were filed by the Complainant on his own behalf since he is a public employe. However, neither our Rules and Regulations nor the Act permits a public employe to file a charge on behalf of "all others similarly situated."

In *Freeport Area School District v. Commonwealth, Human Relations Commission*, 18 Pa. Commonwealth Ct. 400, 335 A.2d 873 (1975), our Commonwealth Court held that the Pennsylvania Human Relations Commission had no power to redress violations of the Pennsylvania Human Relations Act where such violations involved persons who had not filed a complaint or requested to be a party to proceedings before the Pennsylvania Human Relations Commission. The court noted that Pa.R.C.P. 2230 authorizing class actions does not apply to proceedings before administrative agencies and that the breadth of the Pennsylvania Human Relations Commission's order covering persons not parties to the proceedings before it violated due process.

We believe the same analysis should apply to proceedings before this Board. Accordingly, we will limit our review to the charges as they relate to the Complainant only.

The facts in these cases are not in dispute. The Education Association readily admits that it is and has been its policy to limit the right to vote on contract ratification to members of the bargaining unit who are also members of the Education Association. Because of this policy, the Complainant, who has not joined the Association, could not vote on the ratification of an amendment to the current collective bargaining agreement between the Education Association and the School District. This amendment provides, *inter alia*, that the School District's employes shall be covered by a group dental program. The cost of this program is shared equally by the School District and the employe. After the School District deducted his share of the

dental insurance premium from his paycheck over his objection, the Complainant filed the instant charges.

The Complainant first raises a question as to whether the Education Association violated its obligation to fairly represent all bargaining unit members without hostility or discrimination toward any. See *Phoenixville Area School District*, Case Nos. PERA-C-8912/9137-E, 8 PPER 351 (1977). Since the group dental plan to which the Complainant objects applies equally to members and non-members of the Association alike, it would not be the gravamen of the Complainant's charge. *Clairton School District*, Case No. PERA-C-8960-W, 8 PPER 243 (1977). The alleged discrimination of which the Complainant charges pertains, rather, to the limitations the Education Association has placed on the right to vote on contract ratification.

We previously considered whether an employee organization may legally prohibit non-members of the organization from voting on contract ratification in *Reading School District*, Case No. PERA-C-7263-C, 7 PPER 174 (1976). In that case we concluded and found that a school district had violated Sections 1201(a)(1) and (2) of the Act by encouraging non-employe organization members to vote on the ratification of a contract where the employe organization had limited such voting rights to its membership. On the basis of Section 902 of the Act, which provides as follows:

> "If the provisions of the constitution or bylaws of an employe organization requires ratification of a collective bargaining agreement by its membership, only those members who

> belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions"

we said, "an employe organization can and should restrict contract ratification to members of the bargaining unit who are also members of the employe organization." 7 PPER at 176. The Complainant has presented no compelling argument to undermine the correctness of this statement. We, therefore, remain firm in our belief that Section 902 implicitly, if not explicitly, recognizes that employe organizations may limit voting rights to its members.

We find support for this view in *Branch 6000, National Association of Letter Carriers*, 232 NLRB No. 52, 96 LRRM 1271 (1977). In that case a union excluded bargaining unit members who were not also members of the union from voting on a referendum to determine whether the unit would have fixed or rotating days off. The NLRB found the union in violation of the Labor Management Relations Act because the matter voted on directly concerned the working conditions of each member of the unit. Important to our analysis herein, however, is the distinction drawn by the NLRB in *Letter Carriers*. The NLRB expressly noted that the matter at issue in that case was not within the internal domain of the union. The NLRB said:

> "This is unlike the ratification of an otherwise agreed-upon contract, in which the required ratification is an integral part of the union's representation process, and thus an internal union matter properly determinable by union members alone, for the same reasons the members alone

> may choose the negotiators. Here, in contrast, the voting was on the choice of one work schedule or another; so that the voting became a substitute for negotiation and thereby eliminated from the situation the union representation element, and with it the propriety of limiting to union members a voice in the choice." 96 LRRM at 1272-1273.

In the present cases the Complainant was denied the right to vote on the ratification of a previously negotiated amendment to a contract. As an integral part of the Education Association's representation process, the ratification vote was properly limited to its membership. We note in passing that the membership voted overwhelmingly (99 to 1) in favor of the amendment to the contract. Accordingly, the Complainant's vote could not have affected the outcome of the ratification vote in any event.

In his brief, the Complainant further contends that his exclusion from voting on contract ratification solely because he is not a member of the Education Association infringes upon his rights of petition and association and denies him equal protection of the law. The Complainant correctly observes that, since the Education Association is the duly certified employe representative, he cannot bargain individually with the School District. See Section 606 of the Act; *Jefferson-Morgan School District*, Case No. PERA-C-10, 416-W, 9 PPER Para. 9056 (1978). The Complainant is also correct in observing that, under our view of Section 902 as expressed in *Reading*, he is prohibited from voting on the contract bargained by the Education Association. However, the Complainant is incorrect in contending that his constitutional rights have thereby been violated.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1783, 95 LRRM 2411 (1977), the United States Supreme Court unheld the constitutionality of an agency shop agreement under which all employes, regardless of union membership, were required to pay union dues or its equivalent to retain their employment. Relying on *Railway Employees' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 38 LRRM 2099 (1955) and *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 48 LRRM 2345 (1961), the Court said:

> "To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, *sub silentio*.' *International Association of Machinists v. Street*, *supra*, at 778 (Douglas, J., concurring)." 95 LRRM at 2416 (footnote omitted).

See also *Association of Capitol Powerhouse Engineers v. Division of Buildings and Grounds, State of Washington*, Wash. , N.W.2d , 96 LRRM 3004 (1977); *Karchmar v. City of Worcester*, 364 Mass. 124, 301 N.E.2d 570, 84 LRRM 2410 (1973). The legislative policy at issue in *Abood* recognized that the principle of exclusive union representation was necessary to foster harmonious employe-employer relations. It was this legitimate governmental interest which justified the limited infringement of constitutional rights in *Abood*.

Our General Assembly has similarly determined that orderly and constructive employe-employer relations are in the public interest and that collective bargaining is necessary to effectuate this end. See Section 101 of the Act and *PLRB v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975). Central to collective bargaining is the concept of the designation of an exclusive representative to bargain for the employes in an appropriate unit. See Section 606 of the Act. The Complainant in essence contends that this statutory scheme, coupled with the fact that he must join the Education Association to vote on the ratification of contracts negotiated by it as his exclusive employe representative, infringes upon his constitutional rights. We disagree.

In *Abood*, the employes were required to affirmatively support an organization with which they did not desire to associate. This requirement was not unconstitutional. In the present cases, no affirmative action is required on the Complainant's part. He can join and pay dues to the Education Association or not join and not pay dues. If the mandatory requirement

that an employe must pay union dues or its equivalent in *Abood* is constitutional, then Section 902 of the Act is in our view *a fortiori* constitutional. We believe Complainant's constitutional argument advanced herein is far weaker than that advanced in *Abood* since under the Act, Complainant or any other public employe retains the right to join or refrain from joining any employe organization and consequently to pay or refuse to pay union or agency dues or other charges.

Moreover, whatever the Complainant's decision regarding joining or not joining the Education Association is, he has not unconstitutionally lost the right to petition. As noted above, the Education Association is obligated to represent all employes in the bargaining unit fairly. There is not one scintilla of evidence in the record to show that the Education Association has not met its obligation as the duly certified exclusive employe representative.

We note at this juncture that the Complainant's contention that the Education Association unlawfully affiliated with the PSEA and the NEA, thus necessitating increased dues for joining the Education Association, does not state a cause of action under the Act. Matters such as employe organization affiliations and dues are purely internal employe organization affairs. As we said in *Pittsburgh Educational Office Personnel*, Case No. PERA-C-5077-W, 5 PPER 68 (1974),

> "The Complainants however fail to make out a charge of unfair practice, the reason being that a vote to affiliate is an internal union matter. Clearly the Board may not require that non-members of the organization be given the oppor-

tunity to express their opinion as to whether or not the union should or should not affiliate. Individuals who have exercised their right under the Act, in refusing to become a member of an employe organization, can be said to have foregone their opportunity to become involved in the internal operations and affairs of that organization. The question of whether or not that organization chooses to affiliate with a national or international union is of no consequence to the non-member since they play no role and pay no dues accepting only the benefits which the union wins for them at the negotiating table. These persons have clearly not been restrained or coerced in the exercise of their rights under Article IV of the Act since this Article gives them the right to, '... refrain from any such activities ...' i.e. membership in an employe organization. The PEOP by its vote to affiliate with AFSCME has not taken away the right not to join nor has it required the non-members to join. Therefore, non-members cannot be heard to complain about a union's denial to permit non-members to participate in a vote on the question of affiliation." 5 PPER at 69.

We must also reject the remaining allegations of the charges. Since the Education Association did not commit unfair practices relative to the negotiation and ratification of the contract at issue herein, we find that it did not cause the School District to, and that the School District did not, commit unfair practices by implementing the contract against the Complainant. For the same reason, we find that the School District did not unlawfully dominate or interfere with the ad-

ministration of the Education Association. Finally, we find that neither the Education Association nor the School District violated Section 803 of the Act. There has been no showing that the parties were even required to submit to the Article VIII impasse resolution procedures. Accordingly, we dismiss the charges.

CONCLUSIONS

The Board, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That the Eastern Lancaster County School District is a "public employer" within the meaning of Section 301(1) of the Act.

2. That David W. Schreffler is a "public employe" within the meaning of Section 301(2) of the Act.

3. That the Eastern Lancaster County Education Association is an "employe organization" within the meaning of Section 301(3) of the Act.

4. That the Pennsylvania Labor Relations Board has jurisdiction over the parties hereto.

5. That the Eastern Lancaster County School District has not committed unfair practices in violation of Sections 803 and 1201(a), (1), (2) and (3) of the Act.

6. That the Eastern Lancaster County Education Association has not committed unfair practices in violation of Sections 803 and 1201(b)(1) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Pennsylvania Labor Relations Board HEREBY ORDERS AND DIRECTS that the Charges of Unfair Practices filed by David W. Schreffler on December 13, 1977, to the above case numbers be and the same are hereby dismissed and the Complaints issued thereon be and the same are hereby rescinded, and

IT IS FURTHER ORDERED AND DECREED that in the absence of any Exceptions filed pursuant to 34 Pa. Code Ch. 95.98 within ten (10) days of the date hereof, this Decision and Order shall become and be absolute and final.

SIGNED, SEALED AND DATED at Harrisburg, Pennsylvania, this twenty-second day of August, 1978.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Kenneth F. Kahn
KENNETH F. KAHN, *Chairman*

/s/ Joseph J. Licastro
JOSEPH J. LICASTRO, *Member*

/s/ James H. Jones
JAMES H. JONES, *Member*

(Seal)

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

Case No. PERA-C-10,685-C

PENNSYLVANIA LABOR RELATIONS BOARD

vs.

EASTERN LANCASTER COUNTY SCHOOL DISTRICT

Case No. PERA-C-10,686-C

PENNSYLVANIA LABOR RELATIONS BOARD

vs.

EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION

FINAL ORDER

On August 31, 1978, David Schreffler (Complainant) and all others similarly situated filed Exceptions to the Nisi Decision and Order of the Pennsylvania Labor Relations Board (Board) of August 22, 1978. In its Nisi Decision, the Board concluded that neither the

Respondent, Eastern Lancaster County School District (School District) nor the Eastern Lancaster County Education Association (Education Association) had committed any unfair practices, dismissed the charges of Unfair Practices and rescinded the Complaints issued thereon. As a result of these Exceptions, the Board ordered Oral Argument which was heard on October 18, 1978.

After reviewing the entire record, the Board makes the following additional:

FINDINGS OF FACT

That Findings of Fact, numbers 1 through 14 inclusive, as set forth in the Nisi Decision and Order of August 22, 1978, are hereby affirmed and incorporated by reference herein and made a part hereof. That Finding of Fact number 15 is hereby vacated and set aside.

16. That on November 14, 1977, the Complainant inquired about joining the Education Association. He was told by the Education Association that in order to join he must join the Pennsylvania State Education Association (PSEA) and the National Education Association (NEA) with which the Education Association is affiliated. The total membership dues for these organizations is $131.00 of which $30.00 is for membership in NEA, $85.00 is for membership in PSEA, and $16.00 is for membership in the Education Association. (N.T. 23, 33, 81)

17. That bargaining unit members who were not members of the Education Association were notified in advance of the ratification meeting set for September 6, 1977. (N.T. 53, 78)

DISCUSSION

In his Exceptions, the Complainant objects to several of the Board's Findings of Fact. After reviewing the Exceptions, we remain convinced that all our findings except number 15 are based upon substantial evidence in the record and should be reaffirmed. As to finding number 15, the Complainant is correct in asserting that the amounts of dues for the affiliate organizations were incorrectly stated and we have vacated Finding of Fact 15 and made an accurate finding as to the proper amounts at Number 16. We note that this discrepancy had no major impact on our decision; however, the correction must be made to accurately reflect the record.

The charges in these cases were filed by David Schreffler and all others similarly situated. In our Nisi Decision and Order, we concluded that the charges could only be properly filed on behalf of David Schreffler himself. Subsequent to that decision, we have examined and compared the relevant portions of the Public Employe Relations Act (PERA or Act) to the Pennsylvania Human Relations Act under the guidelines set forth by the Pennsylvania Supreme Court in *Commonwealth of Pennsylvnaia, Pennsylvania Human Relations Commission v. Freeport Area School District*, Pa. , 359 A.2d 724 (1976). See *Commonwealth of Pennsylvania*, 10 PPER 10014 (1978). We concluded there that the Board like the Pennsylvania Human Relations could order affirmative relief for persons other than the named complainant when:

> "(1) The complainant alleges that such other persons have been affected by the alleged discriminatory practice and (2) such other persons entitled to relief may be described with specificity." 359 A.2d at 728.

The charges in this case allege that others similarly situated have been affected by the alleged unfair practice. However, as to the second requirement, no list of names has been provided either at or prior to the hearing. The purpose of this requirement is to assure adequate notice of those allegedly entitled to relief to the respondent. In our decision in *Commonwealth of Pennsylvania, supra*, we held that such notice was provided when documents from all those claiming relief were introduced into the record at the hearing. Absent any such specific evidence of those allegedly entitled to relief, we do not believe a class action can be maintained.

We are supported in our decision to require at least some evidence specifying those entitled to relief by federal case law. The National Labor Relations Board has allowed charges to be brought by an individual on behalf of himself and others similarly situated, when a list of those others has been attached to the complaint, *Southern Furniture Manufacturing Co. v. NLRB*, 194 F.2d 59 (5th Circ., 1952) U.S. Cert. den.; *Hercules Powder Co. v. NLRB*, 297 F.2d 424 (5th Circ., 1961). In light of these cases and the requirements set forth in the *Human Relations Commission* case, we will consider this charge as one filed by the Complainant, David Schreffler, in his individual capacity.

The Complainant excepts to the Board's conclusion that the Education Association did not commit any unfair practice in violation of the Act by denying nonmembers the opportunity to vote on ratification of the collective bargaining agreement. As our Findings of Fact indicate, nonmembers of the Education Association were permitted to attend and ask questions at the September 6, 1977, meeting where the amendment to the contract was ratified. In our Nisi Decision and Order, we relied upon the NLRB's decision in *Branch 6000, National Association of Letter Carriers*, 232 NLRB No. 52, 96 LRRM 1271 (1977) for the conclusion that an employe organization could restrict ratification to members of the union. The decision affirming the NLRB's order at 85 LC 11,100 (D.C. Circ. 1979) lends further support to our position. We, therefore, remain convinced that an employe association can restrict contract ratification to members of the bargaining unit who are also members of the association. This position is tacitly supported by Section 902 of the Act.

The Complainant contends that to allow the Education Association to deny nonmembers the right to vote on ratification is to deny them their rights guaranteed under the first and fourteenth Amendments to the United States Constitution. The United States Supreme Court recently addressed the issue of the importance of an employe's right to free association versus the requirement to finance a union as a collective bargaining agent, *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1282 (1977). There, the Court concluded that the importance of collective bargaining and its exercise through an exclusive

representative outweighed the potential interference with the freedom to associate. The same policy favoring collective bargaining that was considered in *Abood* is present in the Act and in light of that policy we do not believe that limiting the Complainant's right to vote caused an unconstitutional interference with the right to associate.

We have also considered the Complainant's argument that the Education Association breached its duty of fair representation to him as a member of the bargaining unit who could not vote on ratification due to his nonmembership in the Education Association. In support of his argument, he consistently cites language from *Steele v. Louisville and N.R. Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944). In *Steele* the petitioner, a black locomotive fireman, was a member of a bargaining unit represented by an organization which had specifically bargained to restrict and ultimately exclude employment for black firemen. The petitioner was not eligible for membership in the organization which excluded blacks. In this setting easily distinguishable from the instant situation, the Supreme Court found that the organization had failed to represent the interests of all its members. In addition, the Court set forth the guidelines under the Railway Labor Act that a union was required to consider requests of nonunion members which it represents and to give them notice of and opportunity for hearing upon its proposed action. We believe that in this case the nonmembers of the Education Association were given the requisite prior notice and opportunity to express their opinions, satisfying the Education Association's duty of fair representation.

We reaffirm our conclusion that the Education Association's affiliation with the state and national organizations is an internal matter and not the basis for finding an unfair practice under the Act.

Our dismissal of the charges against the School District must be upheld. There is no evidence that the School District acted in any manner to interfere, restrain or coerce the Complainant in the exercise of his rights under the Act. The record supports no finding of domination or interference with the formation, existence or administration of the Education Association nor is there support for any finding of the anti-union animus necessary to support a finding of violation of Section 1201(a)(3) of the Act.

Subsequent to oral argument, the Education Association submitted a "Motion to Allow Amendment of Answer" attaching an "Amended Answer." These pleadings read together allege that the purpose of the filing of the charges was to "harass" the Education Association and the School District and characterized the action as "frivolous" and "malicious." No evidence on the record supports these allegations nor does the Education Association accompany its pleadings with factual affidavits or averments in support of the allegation. We therefore cannot on the basis of these pleadings grant a request for attorney fees premised upon alleged malicious motivation of Complainant. Further, our review of the record does not lead us to the conclusion that attorney fees would be warranted on the ground that the action is frivolous. This Board has also declined application for attorney fees in *Northern Communities MH/MR Program*, 9 PPER 9202 (1978).

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Pennsylvania Labor Relations Board HEREBY ORDERS AND DIRECTS that the Exceptions filed by David W. Schreffler and all others similarly situated on August 31, 1978, to our Nisi Decision and Order of August 22, 1978, be and the same, are hereby dismissed and the Nisi Decision and Order, be and the same, is hereby made absolute and final.

SIGNED, SEALED AND DATED at Harrisburg, Pennsylvania, this first day of May, 1979.

PENNSYLVANIA LABOR RELATIONS BOARD

s/ Kenneth F. Kahn
KENNETH F. KAHN, *Chairman*

s/ Joseph J. Licastro
JOSEPH J. LICASTRO, *Member*

s/ James H. Jones
JAMES H. JONES, *Member*

(Seal)

APPENDIX D

SUPREME COURT OF PENNSYLVANIA
Eastern District

Marlene F. Lachman, Esq.
Prothonotary

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Philadelphia. 19107
(215) 496-4600

March 31, 1982

Jeffrey W. Davis, Esquire
Payne Shoemaker Building
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P.O. Box 877
Harrisburg, Pennsylvania 17108

RE: David W. Schreffler, Petitioner v. Pennsylvania Labor Relations Board, et al.
No. 199 E.D. Misc. Docket 1981

Dear Mr. Davis:

This is to advise you that the following Order has been endorsed on the Petition for Allowance of Appeal, filed in the above captioned matter:

"March 26, 1982.

Denied.

Per Curiam."

Very truly yours,
(s) Marlene F. Lachman
Marlene F. Lachman, Esq.
Prothonotary

MFL/mz

cc: James W. Crawford, Esquire
Susan R. Friedman, Esquire
Catherine C. O'Toole, Esquire

APPENDIX E

VERBATIM TEXT OF STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States,

Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

43 Pa. Stat. Ann. §1101.401 (Purdon Supp. 1981):

§1101.401 Employe rights

It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

43 Pa. Stat. Ann. §1101.606 (Purdon Supp. 1981):

§1101.606 Exclusive representation; exceptions

Representatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employes in such unit to bargain on wages, hours, terms and conditions of employment: Provided, That any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect: And, provided further, That the bargaining representative has been given an opportunity to be present at such adjustment.

43 Pa. Stat. Ann. §1101.902 (Purdon Supp. 1981):

§1101.902 Ratification by unit members

If the provisions of the constitution or bylaws of an employe organization requires ratification of a collective bargaining agreement by its membership, only those members who belong to the bargaining unit involved shall be entitled to vote on such ratification notwithstanding such provisions.

43 Pa. Stat. Ann. §1101.1201 (Purdon Supp. 1981):

§1101.1201 Unfair practices by public employers; acts prohibited

(a) Public employers, their agents or representatives are prohibited from:

(1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act.[1]

(2) Dominating or interfering with the formation, existence or administration of any employe organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization.

(4) Discharging or otherwise discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive

representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

(6) Refusing to reduce a collective bargaining agreement to writing and sign such agreement.

(7) Violating any of the rules and regulations established by the board regulating the conduct of representation elections.

(8) Refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.[2]

(9) Refusing to comply with the requirements of "meet and discuss."

(b) Employe organizations, their agents, or representatives or public employes are prohibited from:

(1) Restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act.

(2) Restraining or coercing a public employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances.

(3) Refusing to bargain collectively in good faith with a public employer, if they have been designated in accordance with the provisions of this act as the exclusive representative of employes in an appropriate unit.

(4) Violating any of the rules and regulations established by the board regulating the conduct of representation elections.

(5) Refusing to reduce a collective bargaining agreement to writing and sign such agreement.

(6) Calling, instituting, maintaining or conducting a strike or boycott against any public employer or picketing any place of business of a public employer on account of any jurisdictional controversy.

(7) Engaging in, or inducing or encouraging any individual employed by any person to engage in a strike or refusal to handle goods or perform services; or threatening, coercing or restraining any person where an object therof is to (i) force or require any public employer to cease dealing or doing business with any other person or (ii) force or require a public employer to recognize for representation purposes an employe organization not certified by the board.

(8) Refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

(9) Refusing to comply with the requirements of "meet and discuss."

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ALEXANDER L. STEVAS,
CLERK

No. 81-2351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID W. SCHREFFLER,
Petitioner,
v.

PENNSYLVANIA LABOR RELATIONS BOARD, EASTERN LANCASTER COUNTY SCHOOL DISTRICT, and EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION,
Respondents.

MEMORANDUM OF RESPONDENT EAST LANCASTER COUNTY EDUCATION ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a union that is recognized as the exclusive collective bargaining representative for a unit of public school teachers allows only its members to vote on the ratification of the collective bargaining agreement, is a non-member's constitutional right to petition government for redress of grievances violated?

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PENNSYLVANIA LABOR RELATIONS BOARD, EASTERN LANCASTER COUNTY SCHOOL DISTRICT, and EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION,

Respondents.

MEMORANDUM OF RESPONDENT EAST LANCASTER COUNTY EDUCATION ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent East Lancaster County Education Association urges denial of the Petition for Writ of Certiorari on the ground that the Petition does not present any question warranting review by this Court.

STATEMENT OF THE CASE

The relevant facts and proceedings below are set forth in the Petition for Certiorari at 3-8, and need not be repeated here. It is important, however, to note the following clarifications:

1. Petitioner contends that he was "not allowed to participate" in the September 6, 1977, meeting called by respondent Eastern Lancaster County Education Association (hereinafter "Union") to vote on the ratification of an amendment to its collective bargaining agreement with respondent Eastern Lancaster County School District. Petn. at 5. The same contention was made in, and rejected by, the Pennsylvania courts. They found that petitioner was notified of the ratification meeting and invited to attend by an announcement placed in his personal mail box. Appendix to Petn. (hereinafter "App.") at 3a, 38a. The courts below also found that non-members of the Union, such as petitioner, not only were invited to attend the meeting, but were afforded the opportunity "to ask questions and express their views" before the ratification vote was taken. App. 3a, 9a, 16a-17a, 42a.[1]

2. Although petitioner correctly states that the amendment to the collective bargaining agreement that was ratified at the September 6, 1977, meeting "provid[ed] for a group dental plan", Petn. at 4, he neglects to mention that the same amendment also "increased compensation [and] extended sick leave" for members of the bargaining unit. App. 16a. Petitioner accepted these latter improvements without objection; he objected only to the bi-weekly deduction from his salary of $1.75 (subsequently reduced to $1.31) for dental insurance be-

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[1] The duty of fair representation imposed upon a recognized union by the Pennsylvania Public Employee Relations Act, 43 Pa. Stat. Ann §§ 1101.101, *et seq.* (Purdon Supp. 1981) (hereinafter "Pa. Act") obligates it to communicate with and solicit the views of all employees in the bargaining unit, whether or not they are union members. App. 5a. The Pennsylvania Labor Relations Board (hereinafter "PLRB"), which is the state agency responsible for administering the Pa. Act, and the Pennsylvania courts, concluded in this case that the Union had fully met this obligation.

cause, as petitioner explained, he "has good teeth." App. 9a.[2]

3. Petitioner's assertion that he has been "precluded from voicing his views on the contract which governs the terms and conditions of his employment by the School District," Petn. at 4, is based entirely on the fact that he was not allowed to vote on the ratification of the amendment to the collective bargaining agreement. *See* Petn. 4a, 17a. There is nothing in the record to indicate, and petitioner does not even contend, that the Commonwealth of Pennsylvania, the Eastern Lancaster County School District, or the Union in any other way "precluded [him] from voicing his views" to the School District on the matter of dental insurance or any other term or condition of his employment, or that he was in this respect treated any differently from any other citizens.

5. Petitioner's decision not to join the Union has had no impact whatsoever on his employment. In regard to dental insurance and all other terms and conditions of employment, members and non-members of the Union have been treated identically. "There is," as the PLRB concluded, "not one scintilla of evidence in the record to show that the Education Association has not met its obligation as the duly certified exclusive employe representative" to represent all employees in the bargaining unit fairly. App. 33a.[3]

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[2] Inasmuch as the vote in favor of ratification was 99 to 1, the PLRB found that petitioner's vote in any event would not have affected the outcome. App. 3a, 24a, 30a.

[3] That conclusion was affirmed by Pennsylvania's Court of Common Pleas, App. 19a, and Commonwealth Court. App. 9a-10a.

ARGUMENT

The Union's decision to limit the right to vote on ratification of the collective bargaining agreement to its members did not infringe on petitioner's right to petition government for redress of grievances

Pennsylvania authorizes public school teachers in an appropriate unit to select a union to represent them in collective bargaining with their employing school district, and the union selected is designated as the "exclusive representative" for all of the teachers in that unit. Pa. Act § 1101.66. This arrangement, which for almost half a century has been the cornerstone of national labor policy in the private sector, was approved by this Court for states to use in regulating public sector labor relations in *Abood v. Detroit Board of Education*, 431 U.S. 209, 224-25, 229-30 (1977).

Pennsylvania views the procedure that is used to ratify collective bargaining agreements as an internal union matter. Accordingly, it allows the exclusive representative to decide for itself whether to conduct a vote, and if it does, whether to allow all employees in the bargaining unit or only those who are members of the union to cast a ballot. Pa. Act § 1101.902. In this respect also, Pennsylvania's choice mirrors the policy that exists under federal law in the private sector.[4]

In challenging the constitutionality of the position taken by Pennsylvania *vis-a-vis* the ratification of collective bargaining agreements, petitioner begins by asserting that the state may not penalize a public employee because of the "exercise of his right not to associate" with a union or condition the exercise of that right on the relinquishment of other constitutional rights. Petn. at 10. The

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[4] *See, e.g., NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-50 (1958); *Confederated Indep. Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3rd Cir. 1972); *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967).

Union certainly has no abstract quarrel with this black-letter proposition of constitutional law. In attempting to apply it to the instant case, however, petitioner has fashioned an argument that patently is without merit. Specifically, petitioner argues that because he has chosen to exercise his constitutional right not to associate with the Union, he has been denied the right to vote on the ratification of its collective bargaining agreement with the School District. According to petitioner, the right to vote on such ratification is embodied in his First and Fourteenth Amendment right to petition government for redress of grievances. *Ergo*, petitioner concludes that the state has "penaliz[ed] . . . the exercise of his right not to associate by totally depriving him of his right to petition. . . ." Petn. at 10.[5] As we demonstrate below, the underlying predicate for this argument—*i.e.*, that the collective bargaining process generally, and the right to vote on the ratification of collective bargaining agreements

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[5] The Pennsylvania Act does not, on its face or as applied, *require* a union to deny to non-members the right to vote on the ratification of a collective bargaining agreement; it merely *permits* such a limitation, but leaves to individual unions the decision in this regard. Accordingly, inasmuch as it was the Union, a private entity, that actually denied to petitioner the right to vote, a threshold question in this case is whether there is sufficient state action even to implicate the right to petition. It is not necessary for present purposes to resolve this question since, as we demonstrate in the text, petitioner's argument fails in any event. In order to deal with the underlying theory that he advances, however, we have for purposes of the textual discussion assumed that the question is as follows:

> Does a state infringe the right to petition when it authorizes collective bargaining by public employees through a union recognized as the exclusive representative, but does not require the union to extend to non-members the right to vote on contract ratification?

Although in subdivision (1) of the QUESTIONS PRESENTED section of his Petition, petitioner challenges the constitutionality of exclusive recognition itself, he does not pursue that challenge in the body of the Petition. That issue is, of course, foreclosed by this Court's decision in *Abood*, *supra*.

specifically, are aspects of the First and Fourteenth Amendment right to petition—is in direct conflict with the controlling decisions of this Court.

This Court has made it clear that the right to petition is "not a substitute for the national labor relations laws." *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979). Although the First Amendment gives public employees the same right as other citizens to express their views to government, it does not create for such employees any special right to be heard: "[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond, or . . . to recognize the association and bargain with it." *Id.* at 465. *See also, Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 313 (1979) ("[T]he Constitution does not afford . . . employees the right to compel employers to engage in a dialogue or even to listen.").

It follows that when a state engages in collective bargaining with a union representing its public employees, the bargaining process is wholly independent of the constitutional right of those employees to petition government for redress of grievances. This is why a state "constitutionally may adopt, a statutory policy that authorizes public bodies to accord exclusive recognition to representatives for collective bargaining . . . [and] there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 178 (1976) (Brennan, concurring). *Cf. Adderley v. Florida*, 385 U.S. 39, 48 (1966) (the First Amendment does not require "that people who want to [voice their] views [to government] have a constitutional right to do so whenever and however and wherever they please"). In short, the right to petition does not

compel a state to engage in collective bargaining with its public employees, nor, if a state chooses to do so, does that right require it to provide an opportunity for individual public employees to express their views *as part of the collective bargaining process*, rather than through the normal avenues of communication that are available to all citizens.

The foregoing should be correctly understood. We are not suggesting that a state may use its power to regulate public sector labor relations as an excuse for impermissibly restricting the exercise of First Amendment rights by individual public employees. "[T]he principle of exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions concerning labor relations." *Abood, supra*, 431 U.S. at 230. But petitioner does not contend that Pennsylvania has run afoul of this principle here: there is no dispute about the fact that, other than his ineligibility to take part in the collective bargaining process by voting on contract ratification, petitioner has not been restrained in any way from communicating with the School District to express his views on dental insurance or any other term or condition of his employment. *City of Madison Joint School District No. 8, supra*, 429 U.S. at 176, n.10 (1976); *Abood, supra*, 431 U.S. at 230.

Accordingly, it is unnecessary even to address petitioner's contentions as to whether and under what circumstances the governmental interests served by exclusive recognition could justify restrictions on an individual teacher's right to petition government. *See* Petn. at 10-11. As the courts below correctly concluded, Pennsylvania's decision not to require unions to allow nonmembers to vote on the ratification of collective bargaining agreements, and the Union's decision in this case not

to do so, simply do not infringe upon petitioner's right to petition.[6]

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[6] Petitioner concludes his Petition by suggesting that this Court should resolve a "conflict" between the decision below and a decision of a Florida intermediate appellate court that "as a matter of state statutory construction" required public employee unions to allow non-members "to vote on contract ratification." Petn. at 13-14. Extended discussion is not necessary to demonstrate that differences in interpretation of state statutes by the courts of different states present no federal question for this Court's review.

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JUL 26 1982
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CLERK

No. 81-2351

In the Supreme Court of the United States

October Term, 1982

DAVID W. SCHREFFLER,

Petitioner

v.

PENNSYLVANIA LABOR RELATIONS BOARD;
EASTERN LANCASTER COUNTY SCHOOL DISTRICT;
and
EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION,

Respondents

BRIEF OF RESPONDENT PENNSYLVANIA LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether an employe organization, a private entity, which is the exclusive representative for all employes in a bargaining unit, may, consistent with the First and Fourteenth Amendments, limit voting on contract ratification to members of the organization after the opinions and views of non-members have been voiced and taken into account during the ratification process?

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STATUTE:

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COUNTER-STATEMENT OF THE CASE

Respondent, Pennsylvania Labor Relations Board (PLRB), is compelled to restate the case and facts of the instant controversy as Petitioner has mischaracterized the facts in the Statement of the Case set forth in his Petition for Writ of Certiorari (Petition) and has also deleted several facts pertinent to the Commonwealth Court's disposition of this matter.

The Eastern Lancaster County Education Association (Association) is the certified bargaining representative of certain professional employes of the Eastern Lancaster County School District (School District) pursuant to the provisions of the Public Employe Relations Act, 43 Pa. Stat. Ann. §1101.101, *et seq.* (Purdon Supp. 1981), Act of July 23, 1970, P.L. 563, *as amended* (PERA) (Finding of Fact [FF] 13; R. 202a, 342a). On September 20, 1976, the Association and the School District executed a collective bargaining agreement covering the period from July 1, 1976 through June 30, 1978 (FF 5; R. 359a). The agreement provided that negotiations on wages and fringe benefits would be reopened in 1977. The School District and the Association negotiated the reopener items during the summer of 1977. Pursuant to a tentative agreement reached between the Association and the School District, a meeting was scheduled by the Association for September 6, 1977, to review the terms of the proposed amendment and to consider its ratification (FF 17). A written announcement indicating the time, place and purpose of the meeting was placed in the personal mail box

of each teacher, including that of David Schreffler (Petitioner) (FF 17; R. 271a-273a, 275a-276a, 297a).

Petitioner made no attempt to attend the meeting (FF 11; R. 261a-262a). Petitioner was not an Association member (FF 10; R. 203a) although he had been personally requested to join the Association (R. 271a-272a). All members of the bargaining unit regardless of union membership were served with notice of the meeting (R. 271a-273a, 275a-277a, 299a). Petitioner was *never* told he could not attend the meeting (R. 246a-248a, 300a). Petitioner did not attempt to attend the meeting even though his wife, a non-member of the Association for seven years who is also employed by the School District, attended contract ratification meetings during that period (R. 286a-289a).

At the September 6 ratification meeting, no attempt was made to exclude non-members (R. 286a-289a). One of the purposes of the meeting was to encourage non-members to join (R. 300a). Membership cards were passed out prior to the ratification vote, and non-members were asked to join the Association by signing the cards (R. 299a-300a). Association leaders explained the provisions of the tentative agreement (R. 299a) and an opportunity to ask questions regarding the proposal was given to *all* individuals present at the meeting (FF 14; R. 298a). No attempt was made to limit discussion and questions to Association members and non-members in attendance were permitted to ask questions (R. 298a-299a). Petitioner's claim that he was "precluded from voicing his views on the contract" (Petition at 4) is completely belied by the facts.

A vote was taken among the Association's members at the September 6 meeting resulting in the ratification of the amendment. The vote was approximately one hundred votes to ratify with one dissent (FF 9; R. 203a). The voting procedure was conducted in accordance with the Association's constitution and bylaws (FFs 8 and 9; R. 341a, Article XII). The proposed amendment provided for increased compensation, extended sick leave, and a group dental plan for all members in the bargaining unit. The cost of the dental insurance was to be shared as follows: "The School District shall pay 50% of the members' cost and each member shall pay 50% of the cost." (FF 6; R. 349a)

The amendment to the agreement was formally adopted by the Association and School District on September 8, 1977 (FF 5; R. 202a). Petitioner objected to his inclusion in the dental plan for the reason that he has "good teeth" (R. 266a). Petitioner's stated objection was clearly not based on the fact that he was not allowed to vote on *any* of the negotiated contract benefits, but rather that he did not desire the specific benefit in question (R. 259a-260a, 265a-266a). The School District, over the Petitioner's objection, deducted $1.75 from his October 7, 1977 paycheck for payment of his share of the dental insurance premium. The School District has been deducting $1.31 from each of Petitioner's paychecks for this purpose since January of 1978 (FF 12; R. 244a-245a, 326a). Petitioner subsequently filed charges of unfair practices against the Association and School District pursuant to PERA which are the subject matter of the instant dispute.

Counter-Statement of the Case

The PLRB agrees generally with Petitioner's statement of the proceedings in this matter (Petition at 5-8), with the exception of Petitioner's assertions (1) that he raised the question regarding the alleged violation of his right to petition the government before the Pennsylvania Supreme Court (Petition at 8) and (2) that he raised a constitutional challenge to the "relevant provisions" of PERA (Petition at 11). A reading of the Petition for Allowance of Appeal discloses that reference is made *exclusively* to Petitioner's right of freedom of association. Neither violation of the right to petition the government nor challenge to the constitutionality of any provision of PERA can be found among the stated reasons requesting allowance of appeal.

ARGUMENT

1. The Court below decided the instant dispute in full accord with applicable precedent.

While correctly stating that the Association has a "state law duty to represent all members of the bargaining unit fairly", Petitioner errs in his ultimate claim that the duty of fair representation encompasses a constitutional duty to allow Petitioner to vote on contract ratification. In *Steele v. Louisville and N. R. Co.*, 323 U.S. 192 (1944), this Court stated that in representing union, nonunion and minority employes, a union must represent all employes without discrimination, fairly, impartially and in good faith. The Court went on to state that the union must consider requests and expressions of nonunion members and afford them an opportunity to be heard. As is stated *infra*, this duty of fair representation has been fully adopted in Pennsylvania.

Ratification of a collective bargaining agreement is an internal union matter. *Lear Siegler, Inc. v. International Union, U.A., A. & A.I.W.*, 419 F.2d 534 (6th Cir. 1969); *Houchens Market of Elizabethtown, Inc. v. N.L.R.B.*, 375 F.2d 208 (6th Cir. 1967); *N.L.R.B. v. International Union of Elevator Const., Loc. No. 8*, 465 F.2d 974 (9th Cir. 1972); *Adams Potato Chips, Inc. v. NLRB*, 430 F.2d 90 (6th Cir. 1970), *cert. denied* 401 U.S. 975 (1970); *NLRB v. Raven Industries, Inc.*, 508 F.2d 1289 (8th Cir. 1974).

Argument

Both federal and state courts have refrained from unreasonably extending the duty of fair representation owed nonunion employes to incorporate and include participation in a contract ratification vote which has been regarded as an internal union matter. *Branch 6000 National Association of Letter Carriers v. NLRB*, 595 F.2d 808 (D.C. Cir. 1979); *City of Farmington Hills v. Farmington Hills Police Officers Ass'n*, 79 Mich. App. 581, 262 N.W. 2d 866 (1977); *Daigle v. Jefferson Parish School Board*, 345 So.2d 583 (La. App. Ct. 1977), writ refused 347 So.2d 260 (1977); *Matter of Wald v. Nassau Chapter CSEA*, 340 N.Y.S. 2d 451, 72 Misc. 2d 723 (1973).

The Court below correctly stated that Petitioner's constitutional arguments in effect seek to call into question the collective bargaining process itself. Petitioner's claim that the union's status as exclusive bargaining representative deprives him of his constitutional right to petition the government must fail for several reasons. First, it disregards the compelling state interest in the orderly resolution of labor disputes through collective bargaining. *See, Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The authority relied upon by Petitioner (Petition at 9) is factually inapposite and inapplicable to the legal theory advanced by Petitioner. In *City of Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), nonunion employes were prohibited from speaking at a public school board meeting. There is absolutely no contention herein that Petitioner has been denied the opportunity to speak at a school board meeting or otherwise petition the government and, in fact, was

additionally afforded the opportunity to attend and speak his views at union meetings. In *Abood,* this Court stated that public employes are free (with limited exception not relevant here) to participate in the full range of First Amendment rights including rights to vote in general elections and express views at public governmental meetings such as those of the School District.

Petitioner however confuses these rights, which even he does not allege to have been abridged, with the rights and obligations statutorily created which authorize a collective bargaining representative for public employes. Regardless of the existence of a collective bargaining representative, Petitioner retains all of these rights to petition the government. As the Court stated in *Abood,* the differences between public and private sector collective bargaining do not necessarily translate into differences in First Amendment rights. Simply stated, the right to petition the government is not abridged by the existence of a bargaining representative of public employes.

Further, Petitioner's contention that his right to petition the government has been abridged conveniently ignores Section 606 of the PERA, which statutorily mandates the right of individual public employes to present grievances to their public employer and have them adjusted without intervention by the union. See 43 Pa. Stat. Ann. §1101.-606 (Purdon Supp. 1981). There is no evidence that this right has been abridged or that Petitioner has even availed himself of that right. Petitioner also has full access to the contractual grievance procedure protected by the Association's duty of fair representation.

Argument

Petitioner relies upon *Elrod v. Burns*, 427 U.S. 347 (1976), and struggles to reconcile that reliance with this Court's recent decision in *Abood*. In *Elrod* public employes were fired from their employment in violation of their exercise of constitutionally protected rights of freedom of association. In contrast, Petitioner herein has shown no demonstrable impact on his employment as a result of his non-membership in the Association. His public employer, the Eastern Lancaster County School District, has merely abided by the terms of a collective bargaining agreement which included the objectionable contributory group dental insurance plan that had been ratified by a vote of approximately 100 to 1 (Petition, Appendix "C" at 24a). Petitioner desired not to participate in the dental plan because, as he testified, he "has good teeth" (Petition, Appendix "A" at 9a). Petitioner's claim that his First Amendment rights were "significantly impaired" in any sense analogous to those of the discharged employes in *Elrod* is poppycock. Both this Court in *Abood* and the Pennsylvania Supreme Court in deciding PERA appeals have stated that the limited infringement on individual rights implicit in collective bargaining statutes is justified by the compelling state interest in the orderly resolution of public sector labor disputes. *See, PLRB v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975). The PLRB submits that there is no "unresolved tension" between constitutional rights and union representation as suggested by Petitioner. The tension rather is created by the "free rider" (see *Abood)* who is unwilling to accept the consequences of his own decision to refrain from joining the union and sharing the costs of

collective bargaining and who thereby forfeits the rightful role of a contributing member of the organization.[1]

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2. This case presents no significant, unresolved constitutional issues which should occasion this Court's exercise of jurisdiction.

The Petitioner's discussion of *Abood* (Petition at 12-13) is replete with inaccuracies which demonstrate the strained nature of Petitioner's reliance on that decision as well as the fundamental weaknesses in the propositions advanced.

Petitioner begins with the sweeping assertion that this Court, in *Abood* and *Steele*, "has acknowledged that constitutional issues are inherent in the concept of exclusive representation in the labor relations field". This contention does not withstand even a cursory review of the cases cited. The Court's decision in *Steele* is based not upon any constitutional foundation, but exclusively upon *statutory* rights and duties imposed by the Railway Labor Act. 323 U.S. at 202-204. There is neither a hint of nor an allusion to any application of constitutional principles in the Court's opinion. The only reference to the issue of constitutionality is found in the concurring opinion of Mr. Justice MURPHY—a reference which emphasizes that the Court did not deem it appropriate to resolve *Steele* on a constitutional basis.

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[1] Unlike the employes in *Abood*, "public employes" under PERA have the choice of joining or refraining from joining employe organizations under PERA's "maintenance of membership" provisions. See 43 Pa. Stat. Ann. §1101.301(18).

Equally erroneous is Petitioner's claim that *Abood* recognized a cause of action based solely upon an employe's complaint that a state statute authorizing "agency shop" for public employes violated rights protected by the First and Fourteenth Amendments. To the contrary, the Court held in *Abood* that a state statute authorizing agency shop for collective bargaining purposes including contract administration was constitutionally valid.[3] It was only because of allegations that the agency shop fees in *Abood* were being expended for "political purposes" unrelated to collective bargaining that the Court found some merit in the employe's complaint. 431 U.S. at 234. In the instant case, there is no question that the deductions objected to by Petitioner are clearly within the collective bargaining, contract administration arena contemplated by this Court in *Abood*. The concerns of the Court in *Abood* are clearly not present in this matter.

The most egregious error in Petitioner's discussion, however, which refutes the very grounds upon which Petitioner seeks review in this matter, is the assertion that

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[3] The Court noted that the concept of union shop, which had previously been upheld in the context of private sector labor relations, *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), is the practical equivalent of agency shop for purposes of constitutional analysis. 431 U.S. at 217 n. 10. *See, N.L.R.B. v. General Motors*, 373 U.S. 734, 743 (1963). The Court further emphasized that the differences in the nature of collective bargaining between the public and private sectors are not such as to raise the rights of public employes to a higher plane than private employes. 431 U.S. at 229-231. Thus, the Court held that a public sector agency shop clause is valid to the extent that the service charges are used to finance union expenditures related to collective bargaining.

this Court, in footnote 33 of *Abood*, "expressly reserved decision on the question of the exclusive representative's duties to non-union bargaining unit members with respect to collective bargaining." Petition at 12-13. To the contrary, the Court, consistent with a long line of prior decisions, expressly reaffirmed the principle that, in carrying out its duties, "the union is obliged 'fairly and equitably to represent all employees . . ., union and nonunion,' within the relevant unit." 431 U.S. at 221. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Footnote 33 of *Abood*, 431 U.S. at 236, upon which Petitioner so heavily relies, reserves the Court's judgment only in the area of "social activities" which are unrelated to collective bargaining and contract administration and are far removed from the issue raised in the instant matter. The contention that the language contained in this footnote in any manner demonstrates that this Court has reserved judgment on the question of the duty of fair representation as it pertains to collective bargaining is clearly unsupportable in view of the history of the Court's decisions on this issue.

The union's duty of fair representation, firmly established by this Court in the sphere of Federal labor relations, has been adopted in full measure by the PLRB and the Pennsylvania appellate courts. *See, Robinson v. Abington Education Ass'n*, 492 Pa. 218, 423 A.2d 1014 n. 5 (1980); *Hollinger v. Dept. of Public Welfare*, 469 Pa. 358, 369 n. 17, 365 A.2d 1245, 1251 n. 17 (1976); *Cohen v. Temple University of Com.*, Pa. Super.

, 445 A.2d 179, 184-185 (1982); *Fouts v. Allegheny County,* Pa. Commonwealth Ct. , 440 A.2d 698, 701 (1982); *Phoenixville Area School District,* 8 Pennsylvania Public Employee Reporter (PPER) 351 (1977). Indeed, this Court's delineation of the duty of fair representation in *Steele,* which was accorded much weight by the Court of Common Pleas (Petition at 18a), demonstrates that Petitioner's claim herein (i.e., the alleged absence of a standard regarding the duty of fair representation) is meritless:

> "While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action."

323 U.S. at 204. When this standard is applied to the facts of the present case, the record is undisputed that all employes, whether members or non-members of the Association, received notice of the September 6, 1977 ratification meeting, that non-members were in attendance, and that non-members were permitted to ask questions following the Association's explanation of the proposed amendments to the contract. It was Petitioner's choice not to attend the ratification meeting when he was clearly

permitted to do so, and not the Association's ratification procedure, which precluded consideration of his views on the contract amendments. Petitioner's contention that he was deprived of an opportunity to communicate his views regarding the terms and conditions of his employment is factually inaccurate. There is no evidence in this record which would indicate that the wishes of non-members were ignored or that their interests were not considered by the Association. Compare the facts herein with *Branch 6000*. The evidence of record fully supports the determination of the PLRB, as affirmed by both reviewing courts, that the Association has met its obligation to represent fairly all members of the bargaining unit. Thus, neither the law nor the facts will support Petitioner's challenge to the Association's actions.

The *only* authority cited by Petitioner to support his position with respect to nonunion bargaining unit members having a right to ratify a contract is *International Brotherhood of Painters v. Anderson*, 401 So.2d 824 (5th Dist. Ct. App. Fla. 1981). As Petitioner must concede, this case was not decided on any constitutional grounds. The relevant state statute, unlike many other state laws such as Pennsylvania's PERA, required ratification by union and nonunion members alike. Contrary to Petitioner's contention, the Florida state court did not resolve any constitutional "conflict" between First and Fourteenth Amendment rights and the concept of exclusive representation by a union, but decided the case solely on the basis of statutory construction.

3. The instant case does not involve "state action".

Accordingly, Petitioner's claims premised upon rights guaranteed by the First and Fourteenth Amendments must fail.

The law is well-settled that the Fourteenth Amendment reaches only those acts which are attributable to a state and not to actions which are private in nature. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349-350 (1974). The premise underlying this limitation is that courts should avoid constitutional review of purely private relationships. *Civil Rights Cases*, 109 U.S. 3 (1883). The instant case asks this Court to consider the constitutionality of a *union's* contract ratification procedure—a procedure which is an internal union matter, unregulated by state statute. The PLRB submits that the facts surrounding the Association's contract ratification procedure do not satisfy any of the criteria established by this Court for determining state action.

As is relevant to this case, the Court has found the presence of state action in cases falling essentially into three groups: (1) where state courts have enforced an agreement affecting private parties; (2) where the state has significantly involved itself in the action of a private party; and (3) where there was private enforcement of a public function. *Flagg Bros., supra*, 436 U.S. at 159-164; *Jackson, supra*, 419 U.S. at 351-358. The requirement that Petitioner become a member of the Association in order to vote on contract ratification is based upon the constitution and bylaws of the Association, a private party. The record discloses that the voting procedure in question

was adpoted by the Association's membership and enforced solely by the Association. There has been no enforcement of the Association's voting requirements by any state agency or court. Compare the facts herein with *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state action premised upon state court enforcement of private, racially restrictive covenants against Black purchasers of land) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (creditor, in addition to pursuing collection of debt by private means permitted by Georgia law, resorted to authority of Georgia court, which subsequently ordered garnishee not to pay over money previously the property of debtor).

Petitioner's attempt to predicate state action upon the fact that the Association is "state-certified" is unsupportable in the law. Petition at 12. The mere fact that Pennsylvania has a body of law which regulates the certification and bargaining obligation of an exclusive bargaining representative is insufficient to constitute state action. *See, Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-176 (1972). For a state to be held responsible for the discriminatory action of a private party, it must be demonstrated that "the State, by its law, has compelled the act." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970). While Section 902 of PERA, 43 Pa. Stat. Ann. §1101.902, *permits* employe organizations in their discretion the option of restricting contract ratification to their membership, it does not *compel* such practice. The absence of state-compelled enforcement clearly removes the Association's voting procedure from the claim of state action. This Court's decision in *Jackson* is dispositive on this issue:

> "Approval by a state utility commission . . ., where the commission has not put its weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the state, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment."

419 U.S. at 357. *See, Flagg Bros., supra*, 436 U.S. at 165. The absence of state-compelled action in the instant case renders Petitioner's reliance on *City of Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), misplaced.

Also unsupportable is Petitioner's suggestion that state action may be found because Petitioner has been denied the relief sought before the PLRB and the reviewing courts. Petition at 13. As this Court aptly stated in *Flagg Bros.:*

> "If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.
>
> Not only is this notion completely contrary to 'essential dichotomy,' Jackson, supra, 419 U.S. at 349, between public and private acts, but it has been previously rejected by this Court."

436 U.S. at 165.

In sum, since no enforcement action has been taken by state officials or courts regarding the Association's

voting requirements, the disputed voting practice does not fall within the first category of state action.

Similarly, the state has not significantly involved itself with the private party, the Association, in this matter. The Association's voting practice was not compelled or directed by the state, nor did the Association and the state participate in a joint activity. *See, e.g., Adickes, supra,* 398 U.S. at 170-174 (state process of arrest used to enforce state custom of racial segregation in public eating places); *Fuentes v. Shevin,* 407 U.S. 67 (1972) (state seizure of debtor's private property prior to hearing determining validity of creditor's claims). This second category of state action is typically found when state officials, in an extensively regulated industry, have put their weight behind the challenged private act. *See, Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961); *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 n. 8, and the Court's discussion in *Jackson, supra,* 419 U.S. at 357. Such is not the case herein.

The third category of state action involves "the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson, supra,* 419 U.S. at 352. *See, e.g., Terry v. Adams,* 345 U.S. 461 (1953) (voters' associations racially discriminatory practice affecting public elections); *Marsh v. Alabama,* 326 U.S. 501 (1946) (company town performing all functions of municipality). This Court has set forth the following test for determining state action in this context:

> "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the

> action of the latter may be fairly treated as that of the State itself."

Jackson, supra, 419 U.S. at 351. The suggestion that the action of an employe organization in conducting a contract ratification vote can be treated as an action of the state, or that such action constitutes a function "traditionally exclusively reserved to the State", is patently untenable.

For all the foregoing reasons, the lack of state action in the instant case denies the existence of a constitutional question.

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4. Petitioner did not raise the question of an alleged deprivation of his right to petition the government before the Pennsylvania Supreme Court and is therefore precluded from raising said issue before this Court.

United States Supreme Court Rule 21.1 (h) requires that Petitioner specify the stage of the proceedings and the manner in which the question sought to be reviewed has been raised and preserved. While Petitioner claims that the question of his right to petition the government was raised before the Pennsylvania Supreme Court (Petition at 8), Petitioner fails to specify where in the record and in what manner the question was preserved. The reason for Petitioner's failure to comply with Rule 21.1 (h) in this particular is because the question of Petitioner's right to petition the government was not raised in the Petition for Allowance of Appeal filed with the Pennsylvania Supreme Court. A reading of the Petition for Allowance of Appeal (p. 8) discloses that Petitioner's claim was limited solely to the question of freedom of

association. Petitioner did not preserve the question involving his right to petition the government before the Pennsylvania Supreme Court, thus depriving this Court of jurisdiction on this issue.

Likewise, Petitioner's attempt to call into question the constitutionality of PERA (Petition at 11) must fail insofar as Petitioner did not properly preserve this issue in the state appellate courts. Petitioner presumably seeks to challenge the constitutionality of Section 902 of PERA (43 Pa. Stat. Ann. §1101.902 (Purdon Supp. 1981)) concerning contract ratification. The question of the constitutionality of Section 902 was not raised in the Petition for Review filed in the Court of Common Pleas of Lancaster County (R. 371-41a) and was, at best, vaguely alluded to in the Petition filed in the Pennsylvania Supreme Court. Petitioner's failure to properly preserve this issue precludes its consideration by this Court.

CONCLUSION

The Respondent, PLRB submits that a writ of certiorari should not be granted in this matter for the following reasons:

1. The Petitioner's brief is replete with inaccuracies (with regard to both the facts and the law) which, under United States Supreme Court Rule 21.5, is sufficient reason for denial of the Petition.

2. Petitioner did not properly preserve either the question of an alleged deprivation of his right to petition the government or the constitutionality of PERA, Section 902, in the state appellate courts, thus depriving this Court of jurisdiction over these issues.

3. Petitioner has failed to set forth any factual or legal basis to support a claim of denial of his right to petition the government.

4. Petitioner's claim involving alleged violations of rights derived from the First Amendment by application of the Fourteenth Amendment must fail in the absence of any demonstrated state action.

5. There are no special and important reasons for the issuance of a writ in this matter as contemplated by United States Supreme Court Rule 17. Contrary to Petitioner's contention, the issue of the duty of fair representation to nonunion employes has been addressed by this Court. The facts of record demonstrate that the Association herein has fully complied with its duty fairly to represent Petitioner.

6. Petitioner's claim that he has been denied his right of freedom of association is completely refuted by the facts of record. The authority relied upon by Petitioner is factually inapposite and inapplicable to the legal theory advanced. Petitioner was given a full opportunity by the Association to voice his opinions and to ask questions at the contract ratification meeting.

Wherefore, the Pennsylvania Labor Relations Board respectfully requests that certiorari be denied.

Respectfully submitted,
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